



Expert Witness Statement of Shawn Fremstad and Hayley Brown

Bemke et al. v. Pemacheck

Case No. 21-cv-560

United States District Court of the Western District of Wisconsin November 30, 2022

We are pleased to offer this expert witness statement on the class of disabled residents of Wisconsin who are beneficiaries of Social Security Disability Insurance (SSDI) and are being denied unemployment compensation benefits under Wisconsin Statute §108.04(12)(f) and §108.04(2)(h).

Qualifications

Shawn Fremstad is the Director of Law and Political Economy and a Senior Advisor at the Center for Economic and Policy Research (CEPR), an independent nonpartisan research center in Washington, DC. Fremstad is an expert on disability policy and social insurance, as evidenced by his election to the National Academy of Social Insurance, his authorship of numerous research and policy reports on these topics, and citations in academic publications, policy publications, and the media. With Hayley Brown, Fremstad coordinates and supervises CEPR's work on disability policy. Fremstad has previously served as a Senior Fellow at the Center for American Progress, a Deputy Director at the Center on Budget and Policy Priorities, and as an attorney with civil legal services programs in Minnesota. He received a J.D. from the University of Minnesota.

Hayley Brown is a Research Associate at CEPR with extensive expertise and experience in quantitative data analysis, particularly using the Current Population Survey and American Community Survey, and disability statistics. Brown previously worked in the Research, Markets, and Regulations division of the Consumer Financial Protection Bureau, and for the Brookings Institution's Metropolitan Policy Program. She received her B.S. in geographical sciences from the University of Maryland, College Park.

Hundreds of SSDI Beneficiaries in Wisconsin Have Been Denied Unemployment Insurance Annually Because of Wisconsin's UI Eligibility Ban

As shown in the last column in Table 1 below, we estimate that about 470 SSDI beneficiaries in Wisconsin per year—on average from 2016 to 2021—would have received unemployment insurance but for the state's exclusion of SSDI beneficiaries from UI. In our opinion, this is a conservative estimate for reasons we detail below. Our estimate is based on publicly available data from the Social Security Administration, the Census Bureau, and other sources.

Table 1.

Year (December)	Disabled-Worker Beneficiaries In Wisconsin¹	Estimated Number of Disabled-Worker Beneficiaries in Wisconsin Who are Employed <i>Assumption: 8.6% of SSDI Beneficiaries are Employed</i>	Estimated Number of Disabled-Worker Beneficiaries Who Would Have Received UI in Wisconsin But For SSDI Beneficiary Exclusion <i>Assumption: 0.3% of All Disabled-Worker SSDI Beneficiaries Receive UI</i>
2015	161,864	13,920	486
2016	160,929	13,840	483
2017	160,916	13,839	483
2018	158,502	13,631	476
2019	156,887	13,492	471
2020	153,293	13,183	460
2021	147,961	12,725	444
Average: 2016-2021	156,415	13,452	470

To produce these estimates, we assume that 0.3 percent of all disabled-worker SSDI beneficiaries in Wisconsin would have received unemployment insurance if not for the state's exclusion of them from UI eligibility. The basis for this assumption comes from a February 12,

¹ Disabled-worker beneficiaries are non-elderly adults who are receiving SSDI monthly benefits based on their prior earnings history and having met SSDI's disability standard. Certain spouses and children of disabled-worker beneficiaries also receive SSDI benefits—in Wisconsin in December 2021, 1,198 spouses and 23,976 children received SSDI benefits—but we exclude them from these estimates.

2015 letter from SSA's Chief Actuary Stephen Goss to US Representative Sam Johnson, who was the Chairman of the Subcommittee on Social Security at the time.²

In his letter, the Chief Actuary provided annual estimates of the percentage of SSDI disabled-worker beneficiaries who also received UI from 2015 to 2024. SSA produced these estimates using data matches of SSA administrative data and UI data from the National Directory of New Hires. In our opinion, SSA's estimates are very reliable and the best publicly available data available on UI receipt by SSDI beneficiaries in the period around and after the implementation of the Wisconsin statutes being challenged in this case.³ The Wisconsin Department of Workforce Development could produce a more precise estimate using administrative data, but to our knowledge has yet to do so.

According to the letter, SSA estimated that 0.34 percent of SSDI disabled-worker beneficiaries would receive UI on an average monthly basis in 2015, and that this percentage would decline slightly until it reached 0.3 percent of SSDI disabled worker beneficiaries in 2021. For our primary estimate of the number of Wisconsin SSDI beneficiaries harmed by Wisconsin's UI exclusion, we use the lowest number in this series, 0.3 percent, for all years. We multiply this number by the annual number of disabled-worker beneficiaries of SSDI in Wisconsin. (These numbers come from SSA's administrative data and are published in their annual report series, *OASDI Beneficiaries by State and County*).⁴

Column four of Table 1 shows the results. In 2016, we estimate that at least 483 SSDI worker-beneficiaries in Wisconsin would have received unemployment insurance if not for the state's SSDI exclusion. In subsequent years, this number declines modestly (to 444 in 2021) because of declines in the overall number of SSDI beneficiaries in Wisconsin.

For additional context, the Table above also includes estimates of the number of SSDI disabled-worker beneficiaries in Wisconsin who are employed at a point in time during the year. To produce these estimates we use SSA's National Beneficiary Survey (NBS), an official public source of data on employment and other characteristics of SSDI beneficiaries. The most recent public NBS data is from a survey that began in February 2015 and ended in October 2015 (the "2015 NBS"). The 2015 NBS is a nationally representative survey of SSDI beneficiaries who

² Social Security Administration, Office of the Chief Actuary, "Letter from S. Goss to S. Johnson describing the financial effects on Social Security of H.R.918" (February 12, 2015) accessed on December 2, 2022 at: https://www.ssa.gov/oact/solvency/JohnsonHatch_20150212.pdf.

³ SSA's 2015 estimate is substantially lower than an earlier estimate produced by the U.S. General Accounting Office (GAO). In a 2012 report, GAO estimated that 117,000 people, about 1 percent of SSDI beneficiaries, received SSDI benefits in all three months of a quarter in which they received UI benefits. GAO, *Overlapping Disability and Unemployment Benefits Should be Evaluated for Potential Savings* (July 2012).

⁴ For December 2021, the source is "Wisconsin, Table 4, Number of beneficiaries in current-payment status, December 2021" in Social Security Administration, Office of Retirement and Disability Policy Office of Research, Evaluation, and Statistics, *OASDI Beneficiaries by State and County, 2021*, SSA Publication No. 13-11954 (released November 2022). For 2015-2020, the source is the same table in the prior reports.

were in current-pay status as of June 2014. According to the 2015 NBS, about 11.4 percent of SSDI disabled-worker beneficiaries worked for pay at some point in the previous year (when they were in current-pay status in 2014) and 8.6 percent were employed at the time they were interviewed by SSA in 2015.⁵ An additional 4.4 percent of SSDI beneficiaries reported not being employed at the time of their interview, but having looked for work in the past four weeks. To produce a conservative estimate, we multiply the number of SSDI disabled-worker beneficiaries in Wisconsin by 8.6 percent. According to this calculation, about 13,452 SSDI beneficiaries in Wisconsin were employed on average each year (see column three of the Table).

NBS data is not publicly available by state, but in our opinion it is reasonable to assume that SSDI beneficiaries in Wisconsin work at, or substantially above, this national average. A report published in SSA's Social Security Bulletin in 2011 calculated state-level annual employment rates for SSDI worker-beneficiaries from 1996 to 2007 using SSA administrative data files.⁶ According to this report, Wisconsin's SSDI beneficiary employment rate was substantially higher than the national average throughout this period. In 2007, for example, 21.5 percent of SSDI-only beneficiaries were employed compared to 15 percent nationally.⁷ The report also found that state-level employment rates of Social Security disability beneficiaries generally increased with state-level disability employment rates. Wisconsin was no exception—it had the ninth highest disability beneficiary employment rate and the 15th highest employment rate for all disabled non-elderly adults (ages 21-64).

Since then Wisconsin's has consistently had higher than average employment rates for non-elderly adults overall and for non-elderly adults with disabilities. Among all non-institutionalized, non-elderly adults (ages 21–64) with disabilities (one or more of the six activity limitations the Census Bureau uses to measure disability) in Wisconsin, 42.3 percent were employed in 2015; this disability employment rate was significantly higher than the national disability employment rate (35.2 percent).⁸ On average annually between 2016 and 2021, 79.9 percent of all non-elderly, non-institutionalized adults in Wisconsin were employed, a rate 5 percentage points higher than the national average. Among disabled non-elderly, non-institutionalized adults, 42.8 percent of those in Wisconsin were employed, compared to a national employment rate of 38.4 percent during this time period.⁹ Based on these factors, it is our opinion that SSDI beneficiaries in Wisconsin have continued to have an employment rate that is higher than the national average.

⁵ Table 19 in Social Security Administration, "National Beneficiary Survey" (2018) accessed on December 4, 2022 at: <https://www.ssa.gov/policy/docs/statcomps/nbs/index.html>. These figures are for SSDI-only beneficiaries, so do not include beneficiaries who receive both SSDI and SSI ("concurrent beneficiaries"). Among concurrent beneficiaries, 11.9 percent were employed in 2014 and 8.8 percent were employed at the time they were interviewed in 2015.

⁶ Mamun, A., O'Leary, P., Wittenburg, D.C. and Gregory, J., 2011. "Employment among Social Security disability program beneficiaries, 1996-2007". *Soc. Sec. Bull.*, 71, p.11, last accessed on December 4, 2022 at <https://www.ssa.gov/policy/docs/ssb/v71n3/v71n3p11.html>.

⁷ Table A2 of *Id.*

⁸ Authors' tabulation from American Community Survey using Disability Statistics, Cornell University, last accessed on December 2, 2022 at: <https://www.disabilitystatistics.org/reports/acs.cfm?statistic=2>

⁹ Author's analysis of American Community Survey 1-year samples, 2016–2021. https://github.com/hcbrown/epop_by_state_2016-2021

While we know of no publicly available state-level estimates of UI receipt among SSDI beneficiaries, we believe our assumption that 0.3 percent of Wisconsin's SSDI beneficiaries would have received UI is conservative. This belief is based on Wisconsin's higher than average disability employment (and likely higher than average SSDI disability-beneficiary employment rate) and Wisconsin's somewhat higher than average UI reciprocity rate (percentage of all unemployed receiving UI benefits). Specifically, between 2016 and 2021, Wisconsin was among the twenty states with the highest rates of UI reciprocity in every year but one.¹⁰ Even if we assume that only 0.1 percent of SSDI beneficiaries in Wisconsin would be eligible for UI in the absence of the state's exclusion—an assumption is unreasonably low in our opinion—at least 135 SSDI beneficiaries in Wisconsin have been denied UI benefits, on average annually, because of the exclusion over the past six years.

Finally, based on our review of the documents in the record and our understanding of the demographics of SSDI worker-beneficiaries, we believe that the named plaintiff are typical of class of people in Wisconsin who have been harmed by the state's exclusion of SSDI worker-beneficiaries from UI. Wisconsin's SSDI eligibility ban applies uniformly to any disabled person receiving SSDI benefits without regard to their prior earnings or their possible UI weekly benefit rate. All of the named plaintiffs in the lawsuit are SSDI beneficiaries who have worked for pay while receiving SSDI benefit, subsequently lost employment through no fault of their own, and were determined ineligible for UI because of Wisconsin's exclusion of SSDI beneficiaries from UI. The overall class of SSDI beneficiaries harmed by SSDI exclusion have also been employed while receiving SSDI, subsequently lost employment through no fault of their own, and would have been eligible for UI but for Wisconsin's SSDI exclusion.

Materials Relied On

Complaints and Case Materials

Exhibits A through S attached to "Declaration of Paul A. Kinne," Bemke et al. vs. Pemachek, W.D. Wisconsin, August 12, 2022

Legal Materials

Wisconsin Statute §108.04

Documents and Data

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¹⁰ Wisconsin's UI reciprocity rate averaged over six percentage points higher than the US average between 2016 and 2021. Authors' tabulation using The Century Foundation's Unemployment Insurance Data Dashboard, accessed at <https://tcf.org/content/data/unemployment-insurance-data-dashboard/>

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Prior Publications

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<https://cepr.net/why-union-membership-is-good-for-workers-with-disabilities>

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<https://tcf.org/content/report/economic-justice-disability-justice>

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<https://www.marketwatch.com/story/ripping-away-enhanced-unemployment-benefits-will-disproportionately-harm-working-class-moms-11622031631>

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Rates

\$200 per hour

Sincerely,

A handwritten signature in black ink, appearing to read 'Shawn Fremstad'. The signature is stylized with a large 'S' and 'F'.

Shawn Fremstad
Director of Law and Political Economy, CEPR

A handwritten signature in black ink, appearing to read 'Hayley Brown'. The signature is cursive and fluid.

Hayley Brown
Research Associate, CEPR